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United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE Y. ERLANDSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes

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Petition for review from a decision of the United States Tax Court.

JURISDICTION OF THE COURT

The Tax Court had jurisdiction by virtue of the provisions of Sections 6213 and 7442 of the Internal Revenue Code of 1954.

The United States Court of Appeals for the Ninth Circut has jurisdiction to review the decision of the Tax

Court pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF CASE

This case involves deficiency in income tax for the calendar year 1954 in the amount of $1,960.38 for Petitioner, George Y. Erlandson.

The Petitioner has alleged that the Commissioner erred in including wages of $10,299.97 received by Petitioner as compensation for personal services. The Commissioner contended that such compensation for services is includible in gross income in accordance with the provisions of Section 61(a) of the Internal Revenue Code of 1954. The petitioner contended that such compensation for services is excludible from gross income under the provisions of Section 911(a)(2) of the Internal Revenue Code of 1954.

The case was tried before Hon. Bruce M. Forrester, at Portland, Oregon, on March 4th, 1958. The issues on trial were (1) was the Petitioner present in foreign countries at least 510 full days in the eighteen consecutive month period from October 16, 1952, to April 15, 1954? and, (2) was the Petitioner paid by the United States or an agency thereof?

The original objection of the government to the Petitioner's position was on Issue 1 above and most of the evidence adduced at the trial dealt with that issue. The government has since conceded that issue however, and the only issue on appeal is Issue 2 above.

The petitioner, a U. S. Citizen, was employed on a U. S. owned merchant vessel during the times in question. The ship was operated by the Pacific Far East Line, Inc., under a general agency agreement. The National Shipping Authority of the Maritime Administration, U. S. Department of Commerce reserved to itself certain authority under the general agency agreement. It provided funds to the Pacific Far East Line, Inc., for operational expenses including wages of the seamen. Under the terms of the shipping articles, the Petitioner was employed and paid by the Master of the vessel. The checks paid to Petitioner for his services were drawn upon an account of Pacific Far East Line, Inc., in the Bank of America, and were signed by Pacific Far East Line, Inc., as drawer. The Pacific Far East Line, Inc., received credit for all officer and crew expenses including wages, but this credit could be denied upon a finding of wilful contravention of any existing instructions. The terms and conditions of the Petitioner's employment were determined in accordance with a collective Bargaining agreement between Pacific Far East Line, Inc. and the Master, Mates, and Pilots Local 90.

The tax court found that the Petitioner was paid by the United States or an agency thereof and from this decision, the Petitioner is here seeking review.

The foregoing statement is based upon the stipulation of facts (Tr 9), transcript of proceeding (Tr 11 to 26 inclusive), and upon exhibits No. 1-A, 2, and 6 (1) (2) and (3).

ISSUE ON REVIEW

Was the Petitioner paid by the United States or an Agency thereof so as not to come under the exemption provision of Section 911 (a)(2) of the Internal Revenue Code of 1954.

ARGUMENT

We are dealing with a fiction in the matter of whether the Petitioner was paid by the United States or an agency thereof. It is a fiction because the *fact* is that the Petitioner was paid by the Pacific Far East Line, Inc. Then the problem arises as to question of *law* as to who paid the Petitioner. There are interweaving relationships here involving the seaman and the Master, to whom he was alone responsible; the seaman and Pacific Far East Line, Inc.; the seaman and the National Shipping Authority which was to bankroll the operation but with whom the seaman had no dealings; we must consider what effect on the seaman's rights a contract between the employer (Pacific Far East Line, Inc.) of his employer (the Master) and the National Shipping Authority would have; what significance to the relationship of the seaman and the United States that the union contract between the Master, Mates and Pilots and the Pacific Far East Line, Inc. would have; the legal effect of the actual employment contract, in this case between the seaman and the Master; these and other relationships are present for us to consider in determining whether as a matter of *law* the petitioner-

seaman was paid by the United States. Because without contradiction in the record he was paid by Pacific Far East Lines, Inc.

Now though he was paid by the Pacific Far East Line, Inc., he was employed by the Master (Exhibit 2). In the case of *Cosmopolitan Shipping Co. v. McAllister,* 337 US 783, where for tort purposes the seaman was held to be an employee of the United States, it said across the top of the articles "YOU ARE BEING EMPLOYED BY THE UNITED STATES". In this case there was no such agreement or understanding. In fact, this third party (so far as Petitioner is concerned) agreement called the "general agency agreement" clearly infers that the seaman are not to be agents or employees of theirs. (Paragraph (d), page two of Exhibit 1-A). These two third parties even agree that where Pacific Far East Line, Inc. (one of the parties), and the Master (not a party) are to be agents and employees of the U. S. and never mention any such status for seamen, that the Master shall have and exercise full control, responsibility, and authority with respect to the mannings of the vessel.

Since the United States has agreed with its contractor that full responsibility is on the Master, it would appear that there is no agency in regard to this specific aspect, i.e., "manning" of the vessel, at least so far as such a third party contract can have effect on these parties. This would indicate that the seaman was (1) employed by the Master, (2) that the Master was for these purposes an independent contractor (for al-

though there were general statements about agency relationship between the Master and the United States, the specific contractual arrangements, as here, control as to what the relationship was in fact and in law).

The tax court relying on the case of *Robert W. Teskey,* 30 T.C. 456, has ruled that the Petitioner was paid by an agency of the United States. There are several factors here in addition to the basic principle of need for taxes for government purposes which could provide an impetus for such a decision (1) The United States owns the ship, (2) the Agreement to furnish money to the "general agent", (3) the power retained in the contract to exercise control over the general agent, (4) the power retained in the contract to issue regulations affecting the ship, (5) the statement in the contract that the Master is an agent of the U. S., (6) the fact that the Navy issued regulations affecting the movement of the ship (7) that the actual use of the vessel was for government purposes but the most important of these, since it is the only plausible one, is the factor of the United States bank-rolling this operation. They not only agreed to furnish money to the general agent for purposes including paying wages to the seaman, and the general agent agreed to pay the seamen, but the general agent actually did pay them and the United States actually did furnish the funds.

But what sort of a fund was this? The evidence before the Court does not comprehensively show but there are several factors to be considered. From the general agency agreement, it appears that it was contemplated by the parties that funds other than those

specifically provided for wages (if any there were) would be spent by Pacific Far East Line, Inc., for the payment of wages since the United States agreed to credit Pacific Far East Line, Inc., for any such funds paid. The control of this money appeared to be exclusively in the Pacific Far East Line, Inc., and they spent it at their discretion under the very general directions of the United States to do the work in a workmanlike manner. If they did not do the work properly, the United States could refuse to give them more money under the agreement. This is the case whether or not they paid the seamen. The seamen's remedy in case of non-payment is against the Master. *Everett, et al v. U. S., et al,* 277 F 256. The money once paid over to Pacific Far East Line, Inc., was theirs to do with as they pleased. They had general agreements to spend it in a certain manner, but if they did not do so, and did not pay the seamen, then the remedy of the United States would be: (1) action for breach of contract, (2) withhold further payments under the contract and/or (3) an action on the bond. There was no trust arrangements set up in the general agency agreement and the relationship so far as the manning of the vessel was concerned was not a trust arrangement.

The Tesky case is not stare decisis here. The Court there did not concern itself with the problems created by the relationships. The only concern seemed to be one of where the money came from. Whether the many factors necessary to an adequate decision of the question were even presented to the Tax Court is unknown to the Petitioner, but logically, the reasoning developed in that

case is not strong authority for any proposition. If the fact that the money by which an individual is paid can be traced is determinative of who pays the individual, then the Tesky case certainly should stand. We do not think that is the case.

We have a case then where some facts point in either direction. The seaman is confronted with a situation where according to the Tax Court, he is paid by the United States and yet (1) he cannot collect his wages from them if he is not paid, (2) the ship on which he was employed is operated in substantially the same manner as any other ship not owned by the United States, by Pacific Far East Line, Inc., a company in the business of running ships and not an agency of the United States, (3) he is under the sole and singular control of the Master of the vessel who is not an agency of the United States, (4) he was paid in cash and by check by Pacific Far East Line, Inc. with checks drawn by Pacific Far East Line, Inc., in their bank account, (5) the United States did not have to compensate Pacific Far East Line, Inc., if the company followed certain practices, (6) the control of the United States exercised over the vessel was that control it exercised over all vessels owned or not, (7) he would have to look to his employer, the Master, for his wages if not paid, (8) the United States tried to place full responsibility on the Master for the crew in its contract with Pacific Far East Line, Inc., and in fact had a cause of action against the company if any other fact developed, (9) the United States had agreed to credit Pacific Far East Line, Inc., for monies it spent for wages of seamen;

—these and other factors face the Petitioner who, entitled by the terms of the statute to this exemption, is here seeking it.

Respectfully submitted,

ERLANDSON & ROOK,
Attorneys for Petitioner.